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No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLANTS

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 39) is reported in 43 Fed. (2d) 603. The reports of the Interstate Commerce Commission (R. 9, 14) are reported in 132 I. C. C. 579 and 155 I. C. C. 330.

JURISDICTION

The decree of the District Court was entered December 19, 1930. (R. 44.) Petition for appeal

was filed February 16, 1931, and was allowed on the same day. (R. 47, 48.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C. Sup. III, Title 28, Sec. 47a), and Subsection 4, Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, Sec. 345).

QUESTIONS PRESENTED

The principal question presented is whether the Commission's order of November 5, 1927, prescribing the reasonable division to be received by the Hoboken Manufacturers' Railroad Company out of the joint rate on silk from Pacific Coast ports of import to Hoboken, N. J., was a valid order in so far as it prescribed the future division. The order, as originally entered, prescribed the division retroactively to the date of the complaint, August 6, 1926, as well as for the future. Upon rehearing, it was determined that the order was beyond the Commission's jurisdiction to the extent that it applied retroactively but that it was valid in so far as it prescribed the division for the future, and an amendatory order was entered May 7, 1929, modifying the order of November 5, 1927, so as to change its effective date from August 6, 1926, to a date 30 days after its issuance, or December 5, 1927. Subordinate questions upon which the validity of the order depends are:

Whether the subsequent determination of the invalidity of the retroactive part of the order of November 5, 1927, had the effect of rendering the order totally null and void so as to strike down not only the admittedly invalid part relating to the past but also the separable part having application strictly for the future.

Whether the order of May 7, 1929, amending the order of November 5, 1927, by changing its effective date to December 5, 1927, was within the Commission's power and valid.

Whether the order of November 5, 1927, was supported by substantial evidence showing the division in issue to be unjust, unreasonable, and inequitable and whether the evidence was sufficient to enable the Commission to give due consideration to the matters specified in Section 15 (6) of the Act.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is an appeal from a final decree (R. 44) of the court below annulling and permanently enjoining two orders of the Interstate Commerce Commission, entered November 5, 1927 (R. 12) and May 7, 1929 (R. 22), in a proceeding entitled No. 18672, *Hoboken Manufacturers' Railroad Company* v. *Atchison, Topeka & Santa Fe Railway Company et al.* A third order in the same proceeding (R. 23–

25), dated February 4, 1930, was upheld and the relief prayed in respect of that order was denied (R. 45). No cross-appeal has been taken from the action of the court sustaining this third order.

Proceedings Before the Commission

The proceeding before the Commission was initiated by the filing, on August 6, 1926, of a complaint, under Section 13 (1) of the Interstate Commerce Act, by the Hoboken Manufacturers' Railroad Company, herein called the Hoboken, alleging that its division of 5¼ cents per 100 pounds of the joint rate on silk from Pacific Coast ports to Hoboken, N. J., of $9 per 100 pounds, was unjust, unreasonable, inequitable, and inadequate, in violation of Section 1 (4) of the Interstate Commerce Act. (R. 55, 60.)

The Hoboken is a switching and terminal railroad located entirely within the city limits of Hoboken, N. J., its tracks extending along the Hudson River from 2nd Street to 18th Street in that city. (R. 86; Exhibit No. 1, R. 190.) It is a common carrier engaged in the general transportation of freight in interstate commerce (R. 68, 86, 169–170) and is subject to the provisions of the Interstate Commerce Act. It has direct track connections with the Erie Railroad at 18th Street, over which it interchanges freight with the Erie and, through the intermediary of the Erie, with various other railroads whose lines reach Hoboken. (R. 70.) It is a participating carrier in various tariffs

of joint rates applying between points on its line and points on the lines of other carriers, including the tariff publishing the joint transcontinental rate on silk. (R. 69, 139–140.)

The defendants named in the complaint were 12 western carriers and 24 eastern carriers forming the transcontinental routes over which the silk shipments are transported and participating with the Hoboken in the $9 rate. (R. 55, 139.) Included among the defendants were a number of the largest railroad systems in the country.

The United States Testing Company, conducting a laboratory service for the weighing and testing of silk, and maintaining a textile warehouse at Hoboken, on the rails of the Hoboken (R. 70–71, 110, 112; Ex. I, R. 190), intervened in support of the complaint (R. 64). Under an arrangement entered into between the Hoboken and the Testing Company, the latter acts as agent for the Hoboken in uploading, storing during the free time, and delivering to consignees, all shipments of silk routed for delivery by the Hoboken. (R. 70–71, 76–78, 90, 92, 93, 116, 118–121, 122.)

At the time of the complaint the War Department of the United States was the sole owner of the capital stock of the Hoboken, having acquired it to facilitate operations in connection with the World War (R. 69), and the Secretary of War also intervened in support of the complaint. (R. 64.) Since then the War Department has sold its stock to private individuals. (R. 243.)

At the opening of the hearing held at New York, N. Y., November 22, 1926 (R. 63–206), hereinafter referred to as the first hearing, the Hoboken amended its complaint so as to ask that any increase in its division granted by the Commission be made effective as of the date of the complaint, August 6, 1926. No objection was interposed by the defendants to this amendment. (R. 66.)

The classification rating on raw silk, value exceeding $1 per pound, by ordinary freight-train service, is 1½ times first class. (R. 136.) This import silk, however, is handled in special trains, and the applicable rate of $9 per 100 pounds is a special commodity rate, voluntarily established and maintained by the carriers, higher than the classification basis.[1] (R. 136.) This rate is not a carload rate but is applicable to any quantity. (R. 77.) It applies from Pacific Coast ports to New York and points taking New York rates, including Hoboken. (R. 139–140.)

The primary division of the $9 rate is 72½ per cent to the lines west of Chicago and related gateways and 27½ per cent to the lines east thereof. (R. 134–135; 145–146.) The Hoboken's division is a subdivision of the primary division of the eastern lines, and, when it was 5¼ cents per 100 pounds, amounted to ¼ of 1 per cent of the rate. (R. 59.) Of the $9 rate, therefore, the western lines received $6.52½ per 100 pounds, the eastern trunk lines

[1] Cf. *Director General v. Viscose Co.*, 254 U. S. 498, 502.

$1.42½ per 100 pounds, and the Hoboken 5¼ cents per 100 pounds. (R. 135–136.)

The service performed by the Hoboken as delivering or terminal carrier of the silk shipments is one necessarily involving considerable expense. The four major items of expense incurred in that connection are switching, terminal insurance, policing, and unloading and delivering. These items, shown by witnesses for the Hoboken in great detail, and referred to hereinafter more particularly, aggregated slightly more than 22 cents per 100 pounds. (Ex. 2, R. 139.)

Since these items together constituted the actual cost of the Hoboken's service, aggregating approximately 22 cents per 100 pounds, it follows that on all shipments the Hoboken was compelled to handle at the 5¼-cent division it suffered an actual loss of approximately 17 cents per 100 pounds.

The Hoboken at no time agreed to 5¼ cents as its division on silk. Prior to the filing of its complaint with the Commission on August 6, 1926, it had not handled any shipments of this commodity. (R. 72.) It did not begin to do so until after the United States Testing Company established its plant on its line. About 30% of the silk going to the New York metropolitan district is warehoused, weighed, or tested by the Testing Company. (R. 110–111, 123.) During August, 1926, that company moved from Hudson Street in lower Manhattan to its new location, at 15th Street and Park Avenue in Hoboken, on the rails of the Hoboken, where it had

constructed a new warehouse and laboratory. (R. 112.) The first silk shipments moved over the Hoboken August 14, 1926. (R. 125, 192.) At that time its division on all less-than-carload freight (silk is that type of traffic, R. 71) was $1.05 per ton, or 5¼ cents per 100 pounds (R. 71-72), but that division was not one which contemplated the unusual expense incident to the handling of silk, with its extraordinary value and the risks attendant thereto (R. 71-72, 74, 103).

Investigation made by the Hoboken prior to the filing of its complaint indicated the expensive nature of the terminal service required in the delivery of this commodity. (R. 59.) It averred in its complaint that "special police protection must be provided, as well as protection against theft, fire, burglary, and damage, by insurance," and that "the insurance complainant will have to pay on this traffic will be at the same rate as now paid by defendants at their own terminal," or approximately 11¼ cents per 100 pounds. (R. 59.)

Study of the various items of expense entering into the terminal handling of silk indicated to the Hoboken that total expense would be about 25 cents per 100 pounds, including the insurance expense as well as policing, switching, and unloading and delivering. (R. 59-60.)

As further averred in its complaint, it applied to the defendants for a division of 25 cents but they "declined to grant complainant's request for any increase whatever in the allowance for handling

raw silk over the allowances for general merchandise set forth in paragraph IV, notwithstanding that it is common knowledge that terminal expenses on silk traffic are much greater than on general merchandise." (R. 60.)

Shortly after the complaint was filed the shipments began to move, routed by the shippers over the Hoboken as delivering carrier (R. 118–119), and the Hoboken, being a party to the joint tariff naming the $9.00 rate on silk (R. 69, 139), and in view of its duties and responsibilities as a common carrier, received, transported, and delivered the shipments, and was compelled to accept as its division, constituting its total compensation for the services it performed, the sum of 5¼ cents per 100 pounds.[1]

The Commission, Division 1, in its report of November 5, 1927, found that the Hoboken's division had been since August 6, 1926, and for the future would be, unjust and unreasonable and that the just and reasonable division would be not less than 22 cents per 100 pounds. (R. 12.)

Its order of November 5, 1927 (R. 12–13), issued as part of the report, required that the Hoboken be

[1] The first hearing, Nov. 22, 1926 (R. 63), was held 3½ months after the filing of the complaint, but before the original report and order was issued, November 5, 1927, over a year elapsed. Meanwhile the Hoboken was forced to handle the shipments at the inadequate division of 5¼ cents per 100 pounds. Even after the issuance of that order the Hoboken did not receive the increased division, for the defendants in the Commission proceeding (including appellees) did not obey that order, and it was not until the third order of the Commission became effective on March 10, 1930, that the Hoboken finally received an adequate division.

accorded a division of 22 cents, and provided that the order should take effect as of August 6, 1926, and continue in force until the further order of the Commission.

Proceedings Upon Rehearing

February 20, 1928, this court rendered its opinion in *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, which indicated that the order of Division 1 of November 5, 1927, in the present case might be erroneous in so far as it prescribed a retroactive division, and the Commission on its own motion, by order dated May 14, 1928 (R. 214), reopened the present case for rehearing. Further hearing was held at New York, N. Y., July 13, 1928. (R. 215–340.)

In its report upon rehearing (R. 14), dated May 7, 1929, the Commission found that its earlier action in making the increased division retroactive to the date of the complaint was erroneous, but further found that the order of November 5, 1927, though invalid in its retroactiveness, was valid in so far as it prescribed the division for the future and, by its order of May 7, 1929 (R. 22), amended the order of November 5, 1927, by changing its effective date from August 6, 1926, to December 5, 1927, or 30 days after the date on which the order was issued.

The defendants took the position at the rehearing that the facts to which the Commission is required to give consideration under Section 15 (6)

of the Act were not present in the original record; that, therefore, the original order of Division 1 was null and void; and that any order entered must speak from the date of a final decision upon the entire record. The Commission overruled this contention, holding that the earlier finding as to the *future* division "is amply supported by the evidence upon the original record." (Report upon rehearing, R. 20.)

In its report upon rehearing, the Commission, referring to the November '27 order, said:

> It will be noted that the order prescribed a division from the date of the filing of the complaint, and for the future. The rate of which the division is here in issue was not "established pursuant to a finding or order of the Commission," and under the holding in the *Brimstone Case, supra,* the basis for retroactive application of the division is lacking. The order was, therefore, beyond our jurisdiction in so far as it attempted to prescribe a retroactive adjustment, but it was and is valid as to the future. Its effective date under the circumstances here present must be found to be the date upon which said order could have become effective under the Act. By paragraph 2 of section 15 of the Act "all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order." An order prescribing a division for the future is not

an order for the payment of money. Accordingly, the original order prescribing the division for the future should have become effective on December 5, 1927. (R. 20.)

Following this finding, the order of May 7, 1929, provided:

> *It is ordered,* That the said order of November 5, 1927, be, and it is hereby, modified to read as follows:
>
> *It is ordered,* That on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint east-bound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways. (R. 23.)

By petition dated January 7, 1930 (R. 356), the complainant informed the Commission that "the defendants herein have knowingly and wilfully failed and refused to comply in any respect with the orders of the Commission herein, either the order of November 5, 1927, or said order as modified by the order of May 7, 1929. They have failed and refused to make settlement with the complainant on the basis of the Commission's order or to pay to it out of the through rate on shipments of silk currently transported by the complainant since the Commission's order on rehearing, the division

of 22 cents therein ordered, although complainant has made demand upon defendants for payment of the full division ordered by the Commission; and defendants have also failed and refused to adjust divisions with complainant on shipments transported by complainant on and after December 5, 1927, although complainant has made demand in writing upon defendants therefor. Complainant is informed that the failure and refusal of defendants to comply with said orders of the Commission are due in whole or in part to the contention of defendants, that the Commission was without power by its order of May 7, 1929, to modify or correct its order of November 5, 1927, to make said order effective as of December 5, 1927, although it could undoubtedly have been made effective as of said date when it was originally entered. * * * Complainant believes that the position of defendants is not well taken and that the Commission, having had power to provide by its order of November 5, 1927, when it was entered that it should take effect December 5, 1927, had the power under section 16, paragraph 6 of the Act, at a later date to amend and correct said order to comply with the law as subsequently determined by the Supreme Court. In view of defendants' attitude, however, it seems probable that there will have to be litigation to determine the validity of said orders of the Commission and of the liability of defendants because of their failure and refusal to comply therewith. In the event of

such litigation or the continued failure of defendants to comply with said orders, and so long as the division of rates on shipments that may hereafter move, as well as on shipments transported since December 5, 1927, are determined by said orders, the complainant will continue, on current and future shipments, to be deprived until the conclusion of such litigation of the benefit of the division to which the Commission clearly held it to be entitled." (R. 358, 359.)

"Therefore," the petition continued, "in order that complainant, with respect to shipments to be hereafter transported shall no longer, and pending any litigation which there may be, be deprived of the benefit of such division because of defendants' contention above indicated with respect to the validity of the Commission's orders of November 5, 1927, and May 7, 1929; and further in order to simplify the issues in such litigation, but without in any respect conceding the correctness of the defendants' contentions therein, it is submitted that it would be desirable for the Commission now to issue a new order with respect to the division of rates on shipments which may hereafter be transported by complainant, thereby eliminating the division of rates on such shipments from any litigation presenting an issue as to the validity of the previous orders of the Commission in the respects indicated." (R. 359–360.)

Granting the request of said petition (after answer thereto by defendants, R. 362), the Commis-

sion on February 4, 1930, issued an order providing that on and after March 10, 1930 (more than 30 days subsequent to the date of the order), said complainant shall receive a division of 22 cents per 100 pounds out of the rates in question (R. [illegible]); and said order further povided:

> That the aforesaid orders of November 5, 1927, and May 7, 1929, be, and they are hereby modified so as not to apply to the division of said rates on shipments delivered to and transported by said complainant on and after March 10, 1930, but this order shall not be construed as modifying, amending or rescinding said orders of November 5, 1927, and May 7, 1929, in so far as they relate to and determine the matters in controversy in this proceeding or the rights of the parties hereto prior to March 10, 1930, or with respect to the division of rates on any shipments delivered to or transported by complainant prior to said date. (R. 366.)

Proceedings in Court Below

Petition to enjoin and set aside all three orders (R. 2) was filed March 11, 1930, in the court below by 23 of the 36 carriers, defendants in the Commission proceeding, to whom the orders were directed. The petition alleged the invalidity of the November '27 order on the ground that the evidence on which that order was based was restricted to the facts and circumstances immediately relating to the services performed by the Hoboken and included no facts

or circumstances whatever in connection with any of the factors enumerated in Section 15 (6) relative to the other carriers (defendants) participating in the traffic. The petition also alleged that said order, as well as the May 29 order, was invalid because retroactive.

Further the petition alleged that all three orders were invalid because they failed to exempt shipments moving partly through Canada, but this objection was not pressed in view of the Commission's answer calling attention to the provisions of the Interstate Commerce Act which make it plain that the Commission has no jurisdiction over transportation in foreign countries and suggesting that the Commission's orders were not intended to and should be interpreted as not prescribing divisions of joint international rates. (R. 36–37.)

Answers were filed by the United States (R. 26) and by the Hoboken (R. 29), which intervened (R. 27–29), as well as by the Commission.

After hearing on June 17, 1930 (R. 38), the court rendered its opinion September 19, 1930 (R. 39), holding the first two orders invalid on the grounds alleged in the petition, but sustaining the third order, except in so far as it directed that the two previous orders should remain in effect until the effective date of the third order, March 10, 1930.

From the final decree (R. 44) the United States, the Commission, and the Hoboken appealed (R. 46–50).

SPECIFICATION OF ERRORS TO BE URGED

The following errors of the District Court are urged herein:

1. In setting aside, annulling, and permanently enjoining the Commission's orders of November 5, 1927, and May 7, 1929.

2. In holding that the order of November 5, 1927, was void because not supported by sufficient evidence to enable the Commission to give due consideration to the matters specified in section 15 (6) of the Interstate Commerce Act.

3. In not holding that the order of November 5, 1927, as amended by the order of May 7, 1929, was a valid order in so far as it fixed the future just, reasonable, and equitable division to be received by the Hoboken.

4. In holding that the Commission's order of May 7, 1929, because of the absence of evidence required by the applicable statute to support it, as well as because of its retroactive feature, was null and void.

5. In not holding that the Commission's order of May 7, 1929, which corrected or modified the order of November 5, 1927, so as to make the latter order effective December 5, 1927, instead of August 6, 1926, was a valid order.

6. In not dismissing the petition.

SUMMARY OF ARGUMENT

I. The order of November 5, 1927, though beyond the Commission's jurisdiction in its retroac-

tive part, was a valid order in so far as it prescribed the future division to be received by the Hoboken and was susceptible of amendment so as to eliminate the separable retroactive part and yet save the valid part having application strictly to the future. *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 225.

Section 16a of the Act expressly authorizes the Commission to reverse, change, or modify an order when, after rehearing, if appears that the order is in any respect unwarranted.

II. The order of November 5, 1927, was supported by substantial evidence introduced at the first hearing, which clearly established that the Hoboken's division of 5¼ cents was unreasonably low and less than its cost of service, which aggregated approximately 22 cents per 100 pounds.

The expenses incurred by the Hoboken as delivering carrier of the silk shipments are 3.73 cents for switching, 1¼ cents for policing, 6 cents for unloading and delivering, and 11¼ cents for terminal insurance, aggregating 22 cents per 100 pounds. The item of terminal insurance alone was nearly double its division.

The reasonableness of these costs is indicated by the fact that they are no greater than the costs incurred by the defendants themselves in making delivery of silk shipments in New York. Formerly, the silk shipments now handled by the Hoboken were delivered in Manhattan. Then the trunk line defendants bore costs aggregating 31 cents per 100

pounds in making terminal delivery, including a cost of 12½ cents per 100 pounds for floating the silk across New York harbor. Those carriers are now saved those costs and the Hoboken's increased division of 22 cents per 100 pounds results in a saving to them of 9 cents per 100 pounds.

The evidence demonstrated the inadequacy of the Hoboken's ordinary less-than-carload freight division of 5¼ cents when applied to silk, with its extraordinary value, risks, and increased expenses incident thereto.

It is clear that the 5¼-cent division, if prescribed by the Commission, would have been confiscatory because so far below the cost of the Hoboken's service. *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, 596; *New England Divisions case*, 261 U. S. 184, 195; *United States* v. *Abilene & So. Ry. Co.* (*Orient divisions case*), 265 U. S. 274, 285; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 87.

As held in the *Brimstone case*, page 116, and *Orient Divisions case*, page 284, cost of service to one carrier is not the only factor to be considered in determining just divisions, and it was not the only factor considered in this case, but when it is shown, as in this case, that the cost of the service to one carrier is greater than its division, with the result that the continuance of that division compels the carrier to carry the freight at a loss, then the other factors can not constitutionally be given controlling weight. *New England Divisions case*, at pp.

194, 195; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 477; *Orient Divisions case*, pages 284–285.

III. The evidence introduced at the first hearing sufficiently developed the matters to which the Commission is required to give due consideration by section 15 (6) of the Act, and supports the Commission's original order. The evidence before the Commission relating to the efficiency with which the carriers concerned are operated had particular reference to the transcontinental silk traffic, since the sole issue was the reasonableness of the Hoboken's division of the one rate, $9 per 100 pounds, applicable only on silk transported transcontinentally. The Hoboken's petition to the Commission did not ask for an increase in its divisions on all traffic on the ground that it was in need of additional aggregate revenue, but was predicated upon the fact that the division on import silk was below the cost of its service. Therefore, the case at bar is to be distinguished from cases like *New England Divisions case* and the *Orient Divisions case*, where the divisions of the rates on all traffic were in issue and in which the court held that in determining what the divisions should be the Commission may, in the public interest, take into consideration the financial needs of a weaker road, and that it may be given a division larger than justice merely as between the parties would suggest, in order to maintain it in effective operation as part of an adequate transportation system, *pro-*

vided the share left to its connections is adequate to avoid a confiscatory result. In such cases there must be full evidence as to the efficiency with which the carriers concerned are operated, to be considered in connection with evidence as to the amount of revenue required to pay their respective operating expenses, taxes, and a fair return, to the end that the financial needs of one carrier may not be satisfied at the expense of another carrier also needy. But where the evidence discloses, as in the case at bar, that the division accorded by a large group of trunk-line carriers to a short delivering carrier out of a single joint rate on one commodity only is *below the cost of the service* necessarily rendered by the short carrier in connection with that commodity and hence not adequate to avoid a confiscatory result, evidence as to the general efficiency of the trunk-line carriers is unnecessary because in no event could they be relieved of the obligation to accord the short line, out of a rate voluntarily established and maintained by them, and, therefore, presumably high enough to be profitable, a division commensurate with the cost of the short line's service, on the ground that they, though efficiently operated, are in need of additional revenue. No such need could be satisfied through a division to the short line inadequate to cover that line's actual expenses of handling the commodity.

It was shown that the silk traffic is efficiently handled by the transcontinental carriers. The

record established that the Hoboken's operation is efficient and economical. Its arrangement with the Testing Company to unload, store, and deliver the silk to consignees was shown to be economically sound and in the interest of a safe and efficient operation.

There was general evidence of the amount of revenue required to pay the respective operating expenses of the transcontinental carriers, their taxes, and a fair return on their railway property. Since delivery of the silk traffic by the Hoboken saves the trunk-line carriers terminal expenses of 31 cents per 100 pounds, which they formerly incurred in making delivery at the New York pier stations, the granting of an increased division of 22 cents to the Hoboken does not adversely effect the net revenues of the other carriers. Evidence conclusively establishing that the Hoboken's division on silk was far below the cost of its service demonstrated its need for additional revenue from this traffic.

There was other evidence relating to the importance to the public of the transportation services of the carriers concerned, whether any particular carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate.

ARGUMENT

I

The order of November 5, 1927, applied both retroactively and in futuro. The subsequent determination of the invalidity of its retroactive part did not destroy its requirements as to the future

It is conceded that the order of November 5, 1927, is invalid in so far as it prescribed the Hoboken's division retroactively to the date of the complaint. If the order had been one which fixed the *past* division only it no doubt would have been totally null and void. It is clear, however, that the order applied for the future as well as the past. It provided—

> that of the joint, eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant, at Hoboken, N. J., said complainant *shall* receive a division of 22 cents per 100 pounds, * * *.

This was followed by the provision that the order should take effect as of August 6, 1926, "*and shall continue in force until the further order of the Commission.*" (Italics ours.) (R. 13.)

It is to be noted, too, that the order was based upon a finding of future as well as past unreasonableness of the Hoboken's division. The finding in the report, referred to in the order and made a part hereof, reads:

> We find that on and since August 6, 1926, the division received by the Hoboken out

> of joint rates on silk from points on the Pacific coast to destinations upon its line was, is, *and for the future* will be unjust and unreasonable in that it was, is, *and for the future* may be less than 22 cents per 100 pounds. (Italics ours.) (R. 12.)

The report and order, read together, leave no room for doubt that it was the intention of the Commission to prescribe the future division to be received by the Hoboken, as well as the past.

The court below held the November, 1927, order to be invalid on two grounds, first, because it was retroactive; second, because the evidence offered at the hearing which preceded that order was not sufficient to enable the Commission to comply with the requirements of section 15 (6). (Opinion, R. 41; see assignment of errors, R. 46–47.)

Subsequent parts of this brief refer to the evidence introduced at the first hearing, and show that it clearly established the unreasonableness and unjustness of the Hoboken's division and that it sufficiently developed the matters to which the Commission is required to give due consideration by section 15 (6). This being true, it would follow that the November '27 order was a valid order in so far as it prescribed the future division, unless the invalidity of its retroactive feature automatically destroyed the order *in toto*. It would not appear that it did, because the part of the order relating to the past was clearly separable from the part having application to the future, and the

retroactive portion could be set aside and annulled without striking down the more important provision as to the future. Under the Commerce Court Act, as amended by the Urgent Deficiencies Act, the specially constituted District Courts have jurisdiction to enforce, suspend, or set aside, *in whole or in part,* any order of the Commission. (Cf. *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 49.) It was, therefore, within the power of the court below to have annulled that part of the November '27 order that was retroactive and sustained the part that related to the future, even in the absence of the Commission's order of May 7, 1929 (entered prior to the institution of the court proceeding), amending the November '27 order so as to make it apply only for the future.

The November '27 order was susceptible of amendment so as to eliminate the separable retroactive part and yet save the valid part having application strictly to the future. As held in *L. & N. R. R.* v. *Sloss-Sheffild Co.,* 269 U. S. 217, 225,

> The Commission, like a court, may, upon its own motion or upon request, correct any order still under its control * * *.

1. The order of May 7, 1929, amending the order of November 5, 1927, so as to eliminate its retroactive part and make it apply for the future only, beginning 30 days after its date, was within the power of the Commission under section 16a of the Act and was valid

Section 16a of the Act, authorizing the Commission to grant rehearings, provides that no applica-

tion for rehearing "shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission." Applications were filed by the carriers defendant in the Commission proceeding for reargument or reconsideration and modification of the Commission's original order in the proceeding. (R. 214.) The Commission did not grant those applications but upon consideration of them reopened the proceeding on its own motion for rehearing, by order dated May 14, 1928. (R. 214.) That order did not amend, modify or set aside the November 1927 order,[3] and therefore it must be deemed that that order remained in full force and effect.[4]

Section 16a provides that "if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly."

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[3] There was no order of dismissal in this proceeding as there was in *Minneapolis R. R.* v. *Peoria Ry.*, 270 U. S. 580, 584.

[4] Cf. *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274, 282. Under section 15 (2) of the Act, orders of the Commission such as the November 1927 order here in question continue in force until the Commission's further order, "unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction." At the time of the issuance of the May 1929 amendatory order, there had been no Commission or court order suspending, modifying, or setting aside the November 1927 order.

After the rehearing in the case at bar the Commission concluded that its original order was unwarranted in so far as it applied retroactively, and therefore, by its order of May 7, 1929, amended the original order so as to eliminate its retroactive feature and make it apply only from 30 days after its date, or December 5, 1927.

It seems clear that the provision of section 16a, authorizing the Commission upon rehearing to reverse, change, or modify the former order if it is in any respect unwarranted, permitted the amendment of the November '27 order that was made by the order of May 7, 1929. It may be noted in this connection that section 17 (1) authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business *and to the ends of justice.*"[*]

II

The order of November 5, 1927, was supported by substantial evidence introduced at the first hearing, clearly establishing that the Hoboken's division was unreasonably low, and, indeed so far below the actual cost of its service that, if prescribed, it would have been confiscatory

The evidence submitted by the Hoboken at the first hearing clearly showed that its division of 5¼ cents per 100 pounds was below the actual cost of the service rendered by it in making terminal de-

[*] Cf. *Interstate Commerce Commission* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 92; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 126.

livery of the silk. As stated, its four items of expense are switching, policing, unloading and delivering, and terminal insurance. Comprehensive evidence submitted by witnesses for the Hoboken fully developed the necessity of these expenses, their reasonableness, and the method of calculating them.

The cost of switching the cars from the interchange track with the Erie, the placing of the cars on the Testing Company's sidetrack in a position to unload, and the return of the empty cars to the interchange was shown to be $14.93 per car, or 3.73 cents per 100 pounds on basis of 40,000 pounds per car. This was based upon careful estimates made by the Hoboken of switching costs on 12,565 cars handled during the year 1925, this being the total number of loaded cars of all traffic switched during that year. There was no claim by the Hoboken that the costs allocable strictly to switching were any higher on silk than on any other commodity, and for that reason showed its average switching cost on all traffic as its cost properly chargeable against the switching movement on silk.* (R. 72–73; 89–90, 91, 94–99, Ex. 2, R. 191.)

Because of the extraordinary value of [illegible]ommodity, four special armed guards are empl[illegible] by

*The method by which these costs were arrived at, and the supporting figures and details, were fully developed in the examination and cross-examination of Major O'Neal, in charge of the operations of the Hoboken. (R. 72–75, 86–90, 94–99.) See also testimony of Morgan W. O'Brien, Superintendent of the Hoboken. (R. 103–109.)

the Hoboken to protect the silk from theft while it is on its line, and these guards are paid $5 a day. (R. 75.) The total policing expense averages $5 per car, which reduced to a per 100-pound basis at 40,000 pounds per car equals 1¼ cents per 100 pounds. The Hoboken's insurance policy requires that it provide special police protection for this traffic. (R. 74.)

The duty is upon the Hoboken to unload these shipments from the car (R. 71, 72, 77, 87) and to make delivery to the consignees (R. 76), holding the property in a safe place until such delivery is made. The Hoboken notifies the consignees of the arrival of the shipments (R. 76), and thereafter the consignees have 48 hours free time in which to take delivery. (R. 76.) The tariffs of the Hoboken provide for the free-time period of 48 hours. (R. 174–175.)

The Hoboken holds the silk in the Testing Company's warehouse during the free-time period. (R. 76.) Under the arrangement with the Testing Company, the unloading of the silk from the cars is performed by labor of the Testing Company experienced in the handling, checking, and calculating of silk, under the joint supervision of the Hoboken and the Testing Company. If, upon the expiration of the 48-hour period, no delivery has been taken, the silk is turned into storage with the Testing Company, and thereupon it gives the Hoboken a regular standard warehouse receipt for it.

(R. 76.) The Hoboken's liability as a common carrier expires with the 48 hours free time. (R. 76.)

The normal manner of delivering less-than-carload shipments[1] is through the carrier's freight station. The Hoboken's local freight station is at the foot of 5th Street, but its facilities there are not adequate to take care of silk; it does not have the room, and the character of the building is not suitable for the storage of silk, or suitable for its protection against burglary, fire, theft, or damage. For this reason the Hoboken entered into the arrangement with the Testing Company under which that company acts as agent for the Hoboken in receiving, unloading, and delivering the silk.[2] (R. 76–78, 90–91, 93, 116, 121–131, 174–178.)

The Hoboken pays the Testing Company the actual cost of its services in unloading, storing in

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[1] The shipments, while transported in baggage cars, were not carload but less-than-carload shipments. (R. 71, 179.) The average weight of the lading of the cars, 40,000 pounds (R. 76), was the aggregate weight of a number of l. c. l. shipments transported in a single car.

[2] In the recent warehouse case, *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 513, this Court expressly upheld the right of a carrier to enter into such an arrangement where a forbidden discrimination is not effected, and in earlier cases, especially the *Arbuckle case*, *United States* v. *B. & O. R. R. Co.*, 231 U. S. 274, the right of railroad companies to contract with others to supply freight stations and to perform there the transportation services which the carriers are under a duty to perform, was expressly recognized.

The Testing Company's warehouse, under the arrangement, is expressly made the Hoboken's established delivery point for silk. (R. 77.) All silk shipments routed over the Hoboken as delivering carrier are turned over to the Testing Company as agent for the Hoboken, for delivery to the consignee. (R. 90–91; 118–119.) The Testing Company is in no case the consignee of the shipments. (R. 77.)

the warehouse during the free-time period, and making delivery to consignees. (R. 76; 90–91.) Actual cost figures covering the silk handled during four periods in August, September, and October, 1926, showed the actual cost to be $24 per car of 40,000 pounds, or 6 cents per 100 pounds. (R. 76, 121–128, 129, 130–131; Ex. 2, R. 191; Ex. 3, R. 192–197.)

The final and largest item of expense to the Hoboken is terminal insurance. As a common carrier, the Hoboken is of course liable for any loss, damage, or injury to the silk shipments while they are on its lines or in its possession. Owing to the very high value of the silk, the Hoboken has taken out an insurance policy in the amount of $1,100,000* covering its common carrier liability. (R. 73–75, 99; Ex. 8, R. 205–206.) Under the policy the insurance continues until the common carrier liability of the railroad ceases, which occurs when delivery is made to the consignee, provided that delivery is made within 48 hours after notice of arrival is sent to the consignee. Upon the expiration of the 48-hour period, when the common carrier liability of the railroad is reduced to that of warehouseman, the coverage ceases. The policy is of the general type known as a transit contract, i. e., a special form of full legal liability coverage and it includes fire, theft, burglary, and any loss that

*This would cover the value of only about four carloads of silk. The Hoboken was unable to obtain coverage beyond the $1,100,000. (R. 101.)

might occur for which the Hoboken would be liable. (R. 99–100.)

The premium is 1½ cents per $100 in value. Based upon a valuation of $7.50 per pound of silk, or $300,000 for a car of 40,000 pounds, the premium amounts to $45 per car, or 11¼ cents per 100 pounds. (R. 73–75, 101, 103.)

This is an expense particularly incurred by the Hoboken on silk shipments, no such expense being incurred on other classes or types of traffic. (R. 73–74.)

It is the practice of the transcontinental carriers to insure the silk while in transit (R. 101), but it was shown by the Hoboken that this insurance, taken out at the Pacific coast, does not fully protect the delivering carrier during the entire period that its common-carrier liability obtains (R. 82–83). It was admitted that the transcontinental insurance ends at the time the freight is taken out of the car (R. 173–174), whereas the common carrier liability of the Hoboken extends through the period of unloading from the car, through the free-time period of 48 hours, and until delivery to the consignee is effected[10] (R. 174–175). And it was shown that it is the practice of the Erie Railroad, as well as of the other lines, to take out re-insurance for the period of 48 hours free time when delivery is made on piers in New York (R. 167–168, 174), and that their re-insurance cost is the same as the

[10] *Southern Ry. Co. v. Prescott*, 240 U. S. 632.

Hoboken's, viz., $2.25 per ton, or 11¼ cents per 100 pounds (R. 82).

This and other evidence shows conclusively the necessity on the part of the Hoboken to insure the silk, and the evidence further indicates that the premium it pays is about as low as it can obtain. (R. 99–103.)

The Commission found, as a fact, that the Hoboken's terminal insurance is necessary:

> The value also increases the risk in handling and correspondingly increases the liability for loss. For protection against losses which may and do occur it is necessary to reinsure the value of the silk at a cost of 1.50 cents [illegible] each $100 in value, or approximately 11.25 cents per 100 pounds.
> * * *
> There can be no doubt of the increased risk in handling silk, and in the interest of efficient and economic operation the necessity for insurance and policing is obvious. (Report, R. 11, 12.)

In view of fluctuations in the value of silk, the Hoboken's cost of terminal insurance, based on value, may at times be more or less than 11¼ cents per 100 pounds. That figure is based on a value of $7.50 per pound. ($300,000 for a 40,000-pound car, R. 73, 103.) Testimony at the second hearing indicated extreme fluctuations from $4.80 to $17 a pound. (R. 251–254.) At $6 a pound the premium would be $36 for a 40,000-pound car, or 9

cents per 100 pounds. At the lowest value of $4.80 per pound the insurance expense would be 7.2 cents per 100 pounds. It appears, therefore, that in any event the cost to the Hoboken of the insurance alone exceeded the amount of its 5¼-cent division.

Defendants contended that the switching costs as given by complainant were of no probative value because the average cost was determined by using the entire length of complainant's line, whereas the silk traffic moves only about two city blocks. (See first report, R. 11.) Although the actual distance of the Hoboken's switch movement from the Erie interchange to the Testing Company's warehouse is very short, only about two city blocks (R. 71, 97), it was shown that the cost of that switch movement would be approximately the same as any switch movement over the Hoboken, the entire length of which is 1¼ miles (R. 97), and it was testified that the calculation was a fair one, the only difference between a short switch movement and a longer one being a few minutes difference in time, which would not substantially affect the costs (R. 94, 97.)[12]

[12] The bulk of the Hoboken's switching is in the vicinity of the silk plant. Only l. c. l. freight is handled in the Fifth Street freight house. The l. c. l. traffic is a relatively small portion of the whole. The Hoboken "handles cars from the steamship piers all up and down the waterfront," but "it really costs less to handle it a greater distance, because we can put 10 or 12 cars in a cup [cut] and move it, whereas the switching operations around the silk plants you can only handle 2 or 3 cars at a time. It really costs more, I believe, to handle the short haul than it does the longer haul, because in the longer haul you have got a greater number of cars in your train and the cost is less per car." (R. 97–98.)

As to the reasonableness of the unloading, storing, and delivering cost, it was shown, by undisputed testimony, that the other lines in making delivery at the New York pier stations, incur precisely the same cost, $1.20 per ton, or 6 cents per 100 pounds, based on a loading of 40,000 pounds per car. (R. 82.)

Defendants stated that the cost of policing is conjectural, speculative, and unjustified. The policing cost is based on the time spent by the four guards in protecting the silk during the period from the receipt of the cars on the interchange tracks with the Erie until the silk has been unloaded into the warehouse. (R. 74–75.) Defendants themselves employ special guards to protect the silk shipments in transit and at the destination terminals (R. 102, 158, 159, 167), and it was shown, without dispute, that the Hoboken's policing costs were no more than the actual terminal policing costs of the trunk-line defendants when they make delivery of silk shipments, i. e., 25 cents a ton, which equals 1¼ cents per 100 pounds, or $5 per car of 40,000 pounds (R. 82).

Thus the evidence showed clearly that the cost of the service the Hoboken necessarily performed and the expenses it necessarily incurred as the final or terminal carrier of these silk shipments aggregated about 22 cents per 100 pounds; and the evidence showed, as the Commission found, that

> The costs of handling silk *over that of handling other traffic* are shown by complainant

to be the cost of terminal insurance, policing, unloading, storing, and delivering.[13] (Report, R. 12.) (*Italics ours.*)

The evidence demonstrated the inadequacy of the ordinary less-than-carload freight division of 5¼ cents per 100 pounds when applied to silk, with its extraordinary value and risks;[14] and it would seem clear that the 5¼-cent division, if prescribed by the Commission, would have been confiscatory because so far below the cost of the service. (See *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, 596; *New England Divisions Case*, 261 U. S. 184, 195; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 285; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 87.)

III

The evidence introduced at the first hearing sufficiently developed the matters to which the Commission is required to give due consideration by section 15 (6) of the Act, and supports the Commission's original order

Section 1 (4) of the Act places the duty upon carriers to establish just, reasonable, and equitable divisions of joint rates. Section 13 (1) authorizes any common carrier to file complaint with the Commission because of violation of any provision of the Act by any other common carrier. Section 15 (6) empowers the Commission to prescribe by order the just, reasonable, and equitable divisions of joint

[13] The cost allocated purely to switching was the same as on any other traffic. (R. 73; 86–99.)

[14] Cf. *Director General* v. *Viscose Co.*, 254 U. S. 498, 502.

rates to be received by the several carriers whenever, after full hearing, it is of the opinion that such divisions are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties to the joint rates. The last sentence of section 15 (6) provides:

> In so prescribing and determining the division of joint rates, fares and charges the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operation expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

The evidence introduced at the first hearing, which was before the Commission and received its consideration at the time it made its first order, covered the five matters referred to in section 15 (6) sufficiently to enable the Commission to give due consideration thereto. Evidence introduced at the first hearing in relation to those matters is here referred to.

1. Efficiency with which the carriers concerned are operated.

(a) The record established that the Hoboken's operation is efficient and economical.

The record of the first hearing as a whole contains much evidence bearing on the question of the efficiency of the Hoboken's operation. For instance, the Hoboken's superintendent, in response to a question whether the service given by the Hoboken on the silk traffic is as efficient as the other roads in the region, testified that the Hoboken had been highly commended by the other roads on the way it had handled the cars after they arrived on its road by promptly placing them on the siding for unloading, so as to complete the movement to destination in quick time. (R. 107.) The element of time in the handling of silk, it was testified, is very important. (R. 107.) Indeed, the efficiency of the carriers in handling this silk traffic would seem to be gauged largely by the speed with which they perform the transportation. The enormous value of the commodity requires prompt transportation, for interest alone on the value of a car of silk worth $250,000 amounts to over $40 a day. Safety in transportation is also obviously important.

The Hoboken, in order to reduce its liability by promptly getting the silk under the protection of the Testing Company's warehouse (R. 127), drops other work (R. 105), clears a track (R. 92), and immediately switches the cars to the unloading platform (R. 105).

The policing and insurance protection of the Hoboken also reflect efficient and economic operation. In its report the Commission mentioned the necessity for insurance and policing by the Hoboken "in the interest of efficient and economic operation."

(b) The arrangement under which the Hoboken employs the Testing Company to unload, store, and deliver to consignees was shown to be economically sound and in the interest of a safe and efficient operation.

The defendants contended that there is no obligation on the Hoboken to employ the Testing Company to unload, store, and deliver the silk to consignees, and that the arrangement is economically unsound. (See first report, R. 12.) But the evidence shows directly to the contrary. It was expressly testified that the Testing Company's warehouse "is selected by us because of the safety and economy of operation by the railroad company." (R. 77.) The Hoboken is using that warehouse as its unloading, storing, and delivering point instead of its local freight house. (R. 77.) This is done, as was directly testified, "because it is more economical and convenient to us. It is a better storage, a better safeguard for this commodity."[11] (R. 78.)

[11] The Hoboken did not get the Testing Company to locate on its rails. Major O'Neal testified (R. 90): "After they had located there, that is, after they had made all of their arrangements and purchased the property, and had been discussing railway service with somebody else than me, then they came to me and we found that we had to do something. They had a very large investment there and they were going to give us freight traffic. So we took a good many months to figure around just what was the best arrangement to make. We realized that our own facilities were entirely inadequate to take care of this valuable commodity, to properly safeguard it, but that

It was testified, further, that the charge made by the Testing Company for the unloading and delivering is reasonable and that "the facility that is there offered is convenient for an efficient operation." (R. 85.)

Defendants further contended that the Hoboken "should unload and store the silk in its warehouse with other less-than-carload freight, and if that would not be practicable then to leave it in the cars under transcontinental insurance until delivery to consignees or else deliver it to the Testing Company as agent of the consignees, thus relieving itself of all liability." (See original report, R. 12.) But apparently the Hoboken can not follow the latter alternative. The Testing Company is not the agent for the silk shipper or receiver (R. 117), and is in no case the consignee (R. 77, 116), nor is any of the silk consigned in care of that company (R. 118). The bills of lading, which are usually "order-notify," specify Hoboken Manufacturers' R. R. delivery, and all shipments of silk received by the Hoboken, irrespective of whom they are consigned to, are turned over to the Testing Company, as the Hoboken's agent, for delivery to the

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the facilities they were providing were quite ample and could be made to meet our own need as well as their own. So we proceeded to make an arrangement with them whereby we used a portion of their warehouse for the storing of the silk so long as it belonged to us for the forty-eight hours, and an arrangement whereby they would with their own labor perform the unloading under the joint supervision of our company and their company, *and they were to make us a charge as to the actual cost of the service and no more, actual cost of unloading it, storing and delivering to the consignee.*" (R. 90–91.)

consignee.[16] (R. 118–119.) The facilities of the Testing Company are utilized by the Hoboken as its established place of delivery, in lieu of its freight station, which is unsafe and inadequate for the common-carrier duties of the Hoboken in the storage and delivery of this extraordinary article. (R. 77–78, 119.) Respecting the suggestion that delivery be made to the consignees from the cars, no evidence was submitted by the defendants to contradict the testimony that the arrangement with the Testing Company is convenient, economical, and efficient, or to show that, contrary to the universal practice of making delivery of less-than-carload shipments from the carrier's warehouse, it would be practicable, safe, convenient, or economical to attempt to deliver such shipments from freight cars.

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[16] The Testing Company gives the Hoboken a receipt for the silk immediately upon unloading it from the cars. "We have a check sheet and a receipt immediately upon the car being unloaded. They sign our check sheet and then if the freight remains in storage after 48 hours they give us a warehouse receipt." (R. 91.) As to whether the Hoboken or the Testing Company is liable for this silk after it is unloaded and after the Testing Company has given its receipt to the Hoboken, the Hoboken can not shift the common carrier liability that rests upon it for the period of 48 hours. The shipper, of course, would look to the railroad, but as between the railroad and the Testing Company, the latter is liable to the Hoboken. (R. 91.)

The Testing Company does not make a test of the silk on delivery, it does so only upon request of the consignee. The carrier does not authorize any testing. (R. 93.)

Further details regarding the activities of the Testing Company and of the service it performs for the Hoboken, is given in the testimony of Witness Daniel E. Douty, Vice President and General Manager of the Testing Company (R. 109–121), and of Witness Everard C. Brown, in immediate charge of the Testing Company's warehouse, shipping, and billing departments (R. 121–182), and compare testimony of defendants' witness H. Wilson. (R. 168–187.)

Finally, it may be noted that the present arrangement under which silk shipments are delivered by the Hoboken, and in turn through the agency of the Testing Company, is one in the interest of efficient and economic handling, resulting in a saving to the silk industry and to carriers, the elimination of wasteful transportation, and the unnecessary, duplicated expense of lightering the silk across New York Harbor and back again to the Jersey side, where most of the silk mills are located. (See R. 78–79; 113–116.)

(4) The record indicated that the silk traffic is efficiently handled by the transcontinental carriers.

Gauged by the speed and safety with which they perform the transportation, it would seem that the handling of the silk traffic by the transcontinental carriers is efficient. The shipments are transported east in solid trainload lots. (R. 115–116.) This is made possible by the fact that the consignees do not specify the transcontinental route over which the shipments shall move[17] (R. 15), the routing being left open so that all of the silk arriving in any one ship may be gathered into trainload lots and routed by one road. (R. 115.) The distribution to the initial carriers at the Pacific ports of import is left to the steamship lines and to the rail carriers. (R. 115.)

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[17] The Hoboken is, however, specified as the delivering carrier. (R. 118–119.) The shipments are consigned to a named consignee (R. 77, 113), destination Hoboken, N. J., "Hobpken Manufacturers' R. R. delivery" (R. 118–119).

The movement across the continent is expedited and great speed is attained, up to a maximum of 100 miles per hour (R. 102), the run usually being completed in 3½ days (R. 102, 136). Baggage cars, which are passenger rather than freight cars, are usually employed for this service. (R. 107.)

Armed guards travel with the trains across the country (R. 102) for the protection of the silk against banditry, four patrolmen usually being assigned to the train (R. 159, 167).

In addition to the police protection, insurance is taken out covering the risk in transit, the premium paid by the transcontinental carriers being 4 cents per $100 for the trip. (R. 102.)

Due to the good police protection and other protection thrown around the silk by the carriers, the loss and damage claims are very small. (R. 172, 179.)

The evidence before the Commission relating to the efficiency with which the carriers concerned are operated had particular reference to the transcontinental silk traffic, since the sole issue was the reasonableness of the Hoboken's division of the one rate, $9 per 100 pounds, applying on silk alone. The Hoboken's petition to the Commission did not ask for an increase in its divisions on all traffic on the ground that it was in need of additional aggregate revenue, but was predicated upon the fact that the division on import silk was below the cost of its service. Therefore, the case at bar is to be distinguished from cases like the *New England* and

Orient divisions cases, where the divisions of the rates on all traffic were in issue and in which the court held that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road, and that it may be given a division larger than justice merely as between the parties would suggest, in order to maintain it in effective operation as part of an adequate transportation system, *provided the share left to its connections is adequate to avoid a confiscatory result.* In such cases there must be full evidence as to the efficiency with which the carriers concerned are operated, to be considered in connection with evidence as to the amount of revenue required to pay their respective operating expenses, taxes, and a fair return, to the end that the financial needs of one carrier may not be satisfied at the expense of another carrier also needy. But where the evidence discloses, as in the case at bar, that the division accorded by a large group of trunk-line carriers to a short delivering carrier out of a single joint rate on one commodity only is *below the cost of the service* economically and efficiently rendered by the short carrier and hence not adequate to avoid a confiscatory result, evidence as to the general efficiency of the trunk-line carriers seems irrelevant because in no event could they be relieved of the obligation to accord the short line, out of a rate voluntarily established and maintained by them and therefore presumably high enough to be profitable, a division commensurate

with the cost of the short line's service, on the ground that they, though efficiently operated, are in need of additional revenue. No such need could be satisfied through a division to the short line inadequate to cover that line's actual expenses of handling the commodity.

2. The amount of revenue required to pay the respective operating expenses of the carriers concerned, taxes, and a fair return on their railway property.

The 12 western carriers, defendant in the Commission proceeding, included such large systems as the Santa Fe, the Milwaukee, the Northwestern, the Rock Island, the Northern Pacific, Great Northern, Burlington, Union Pacific, Southern Pacific, Western Pacific, Missouri Pacific, and Illinois Central. These great transportation systems are unquestionably representative carriers in the Western District. Among the 24 eastern defendant carriers were the New York Central, the Pennsylvania, the Baltimore & Ohio, the Nickel Plate, the Erie, the Wabash, and other large systems forming the backbone of the Eastern District.

The net railway operating income of the carriers in the Eastern District and the Western District, and in the several regions in those districts, the operating income and the rate of return on the property investments were shown. (Exhibits 4 and 5, R. 199–201.) These figures were introduced at the first hearing, November 22, 1926, and covered the first eight months of that year and com-

pared the figures for that period with the corresponding period in 1925. For the 1926 period, Eastern District, the net railway operating income was $389,093,089 and the rate of return 5.69%, whereas for the Western District, 1926, the net railway operating income was $250,368,023, rate of return 4.28.

This evidence was put in by the western carriers (R. 132–146), who asked that any increase granted in the Hoboken's division be deducted from the primary division of the eastern lines (R. 133–135; 140–146).

(a) Delivery of the silk traffic by the Hoboken saves the trunk-line carriers terminal expenses of 31 cents per 100 pounds which they formerly incurred in making delivery at New York pier stations. Hence, the increased division to the Hoboken of 22 cents per 100 pounds does not adversely affect the net revenues of the other carriers.

The revenue under the $9.00 rate, at a per car weight of 40,000 pounds, is $3,600 per car. Under the divisions in effect at the time of the Hoboken's complaint, the revenue accruing to the western lines was $2,610 per car (72½%); to the eastern trunk lines, $969 per car (27%); and to the Hoboken $21 per car (½%). Under the Hoboken's increased division of 22 cents per 100 pounds, the revenue accruing to the western lines is the same as before (72½%); to the eastern trunk lines $902 per car (25.05%); and to the Hoboken, $88 per car (2.45%). In other words, the eastern lines' revenue is reduced

$67 per car and the Hoboken's revenue is increased in the same amount. Tabulated, these figures are as follows:

	Old division		Prescribed division	
	Per 100 pounds	Percentage	Per 100 pounds	Percentage
Western lines	$0.6360	72½	$0.636	72.50
Eastern trunk lines	.2425	27	.245	25.05
Hoboken	.0035	½	.220	.45
	.8820	100	.900	100.00

Revenue per car basis:

	Old division per car	Prescribed division per car
Western lines	$2.610	$2.610
Eastern trunk lines	909	902
Hoboken	21	88
	3.600	[illegible]

The eastern lines made no contention whatever that an increase in the Hoboken's division would unduly shrink their division or adversely affect their revenues.

But evidence adduced by the western carriers and by the Hoboken demonstrated that the revenues of the eastern carriers would not be adversely affected by an increase in the Hoboken's division to 22 cents. This evidence established two ultimate facts, first, that the primary division of the eastern lines to New York, Philadelphia, Baltimore, and Washington and a narrow strip between those points taking in the large Atlantic Coast terminals,

were increased from 25 to 27½ per cent, effective May 1, 1922. (R. 135, 137.) One reason for granting this increased division was the "terminal costs at the Atlantic Seaboard" (R. 137); second, prior to the Testing Company's removal of its warehouses and laboratory from the Manhattan to the Jersey side, the cost to the Erie Railroad and the other trunk-line defendants, whose rails end on the Jersey side (this being true of all those carriers except the New York Central, R. 81), of effecting terminal delivery was 31 cents per 100 pounds (R. 79–82). This cost was shown by undisputed testimony, and it included the heavy expense of floating the silk across New York Harbor (R. 79–82; 165) and other costs similar to those now borne by the Hoboken, including reinsurance, policing, unloading, and delivering (R. 82, 160, 162, 167, 174). When the Testing Company was located in Manhattan delivery to the consignees was made at the carrier's pier stations in New York. (R. 79, 119, 160, 162.) The silk had to be thereafter drayed from the pier to the Testing Company's plant (R. 113, 119), but the cost of 31 cents included nothing for such drayage. Tabulated, the costs for making pier delivery on the New York side were as follows:

	Per ton	Per car	Per 100 pounds
			Cents
Floating	$2.60	$80.00	12.60
Unloading and delivering	1.30	24.00	6.00
Insurance	2.25	45.00	11.25
Policing	.35	6.00	1.35
Total	6.50	134.00	31.00

After the removal of the Testing Company to its present location on the rails of the Hoboken, the west-side carriers were relieved of this expense and in lieu thereof, under the Commission's order, they are required to pay the Hoboken only 22 cents. Thus the increased division to the Hoboken can not reduce the earnings of the eastern lines, but instead will have the effect of increasing them to the extent of 9 cents per 100 pounds, equaling $36 per car of 40,000 pounds.

The increase in the eastern lines' primary division from 25 to 27½ per cent increased their revenue $90.00 per car. As shown, the revenue under the $9.00 rate, based on 40,000 pounds per car, is $3,600 per car. Under the former primary divisions of 75 and 25 per cent, respectively, the revenue of the western lines was $2,700 per car and of the eastern lines $900 per car, whereas, under the changed divisions of 72.5 and 27.5 per cent, respectively, the revenue of the western lines is $2,610 per car, a decrease of $90 per car, and of the eastern lines $990 per car, an increase of $90 per car. The increased subdivision of 22 cents per 100 pounds to the Hoboken aggregates $88 per car. It is obvious that the increase in the primary division granted by the western lines to the eastern lines because of heavy terminal expenses at the Atlantic Seaboard alone more than covers the entire reasonable division prescribed for the Hoboken, and when the saving of 9 cents per 100 pounds effected through making terminal delivery on the Hoboken rather than

on the Manhattan side is taken into consideration, it is evident that the revenues of the eastern trunk lines are bettered.

Witness Toll, agent of the Trans-Continental Freight Bureau, testifying in behalf of western carriers (R. 132–133), adverted to the saving to the eastern line-haul carriers by the use of the facilities of the Hoboken for delivery, and called attention to the fact that under the divisional arrangements between the western and eastern lines any such saving accrues entirely to the eastern lines. (R. 135.) For that reason, he urged that any increase in the Hoboken's division should be absorbed by the eastern lines, for otherwise the anomalous situation would be brought about "where all of the economies would accrue to the lines east of Chicago" and yet the western lines would pay a portion of the increase in the Hoboken's division. (R. 135; see also R. 138–146.)

The same witness, after pointing out that "the rate of return for the central eastern region was 4.86 per cent in 1925 and 5.24 per cent in 1926, whereas the rate of return to the western district (as a whole) was 3.63 per cent in 1925 and 4.28 per cent in 1926," made the following statement:

> If, in reaching a conclusion in this matter the Commission should be actuated by the needs of the complainant carrier as was the case in the New England Divisions Decision, then we respectfully submit that the eastern

lines' earnings are and have been for a considerable period, greater than those of the western lines and come nearer to approximating the rate of return contemplated by Congress. (R. 136, 137.)

But it is evident from the Commission's first report that in reaching its conclusion the Commission was not actuated by the needs of the complainant carrier other than its indisputable need for revenue in the form of a division on the silk traffic that would at least cover the cost of the service it rendered.

(b) Evidence conclusively establishing that the Hoboken's division on silk was far below the cost of its service demonstrated its need for additional revenue from this traffic.

At the first hearing the Hoboken made no claim, and submitted no evidence to show, that it was in a weak financial condition, although its evidence upon rehearing showed this to be a fact. For it based its case originally upon the fact that its division of 5¼ cents, applicable to ordinary less-than-carload freight, was wholly inadequate when applied to the silk traffic with its extraordinarily high terminal expenses, and far below the actual cost of the service. It would seem that in these circumstances it was not necessary that the Hoboken should submit evidence of its general financial condition, for whether it were strong or weak, it could not be compelled to handle the traffic at a loss or

at any compensation less than its reasonable cost of service. It is settled that a carrier may not be required to maintain a rate on a particular commodity that is below the cost of the service rendered in transporting that commodity, on the ground that it is able to earn a profit on all of its business. *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585; *Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 549; *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 480, 481, 482, and cases cited. The same rule of law applies to divisions of joint rates, for the share or proportion of the joint rate which a particular participating carrier receives is in fact that carrier's rate, in so far as its earnings are concerned.

Evidence that the Hoboken's division was lower than the cost of the service efficiently and economically performed by it established indisputably its need for additional revenue upon this traffic and enabled the Commission to give due consideration to its revenue requirements.

3. Importance to the public of the transportation services of carriers concerned.

It was testified that the Hoboken Manufacturers' Railroad is an essential factor in the commerce and industry of Hoboken. (R. 132.) "It is the only rail service maintaining direct connection with the piers of 12 ocean-going steamships, the Federal Terminal Buildings which house several nationally known industries, and the two largest warehouse develop-

ments in the city. This railroad occupies a strategic position along practically the entire water front of Hoboken and industries locating on this water front in the future will be dependent upon the continued operation of the Hoboken Manufacturers' Railroad." (R. 132.) The importance to the public of the transportation services of the great transcontinental railroad systems is apparent from the record as a whole and is probably a matter of which judicial notice may be taken. (See especially Exhibits Nos. 4 and 5, R. 199, 201.)

4. Whether any particular participating carrier is an originating, intermediate, or delivering line.

The testimony shows that the Hoboken is the delivering line of the shipments of silk in question (R. 71) and that the other lines in the route are originating or intermediate lines (R. 133–137; 138–146).

5. Any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate.

Facts already stated, indicating clearly that the Hoboken, as the delivering carrier, is subjected to many unusual expenses in making terminal delivery of the highly valuable commodity involved, in addition to the cost of its haul, established that the Hoboken is entitled to a division of the joint rate on silk larger than one measured solely by its mileage haul.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed with directions to dismiss the petition for want of equity.

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APPENDIX

The Interstate Commerce Act provides:

SECTION 1(4). *Duty to furnish transportation and establish through routes; division of joint rates.*—It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 13(1). *Complaint to Commission of violation of law by carrier; reparation, investigation.*—That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof,

may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 15(2). *Orders of Commission.*—Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

SEC. 15(6). *Commission to establish just divisions of joint rates, fares, or charges; adjustments.*—Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or

property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

SEC. 16(6). *Suspension or modification of orders.*—The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

SEC. 16a. *Rehearings by Commission; stay; decisions.*—That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

SEC. 17(1). *Conduct of proceedings, etc.*—That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *